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U.S. Department of Homeland Security

Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536

[REDACTED]

File: [REDACTED] Office: VERMONT SERVICE CENTER

Date: SEP 30 2003

IN RE: Petitioner:
Beneficiary:

[REDACTED]

Petition: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:

[REDACTED]

identifying data deleted to
protect privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.



Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a church. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(4), to perform services as an organist. The director determined that the petitioner had not established that the beneficiary's position is a qualifying religious occupation.

Section 203(b)(4) of the Act provides classification to qualified special immigrant religious workers as described in section 101(a)(27)(C) of the Act, 8 U.S.C. 1101(a)(27)(C), which pertains to an immigrant who:

- (i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;

- (ii) seeks to enter the United States--

- (I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,

- (II) before October 1, 2003, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or

- (III) before October 1, 2003, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of the Internal Code of 1986) at the request of the organization in a religious vocation or occupation; and

- (iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

On appeal from the director's decision, counsel focuses on the issue of full-time employment. A copy of the denial, submitted on appeal, includes a highlighted passage which reads "supporting evidence must specifically demonstrate that the qualifying religious work has been and will be full-time, and provides the number of hours per week which have been and will be spent performing the religious work." This passage, however, is merely a general statement regarding evidentiary requirements; it is not a finding by the director. Nevertheless, the director had previously raised this issue, instructing the petitioner to submit evidence that the petitioning church would employ the beneficiary full-time.

In response to that notice, counsel contests the director's assertion that "the law requires continuous, two years full-time experience in the religious occupation" (emphasis in original). The beneficiary seeks permanent immigration benefits based on her employment for the petitioning church. Occasional, part-time ancillary employment with a religious entity cannot suffice to secure these benefits.

The legislative history of the religious worker provision of the Immigration Act of 1990 states that a substantial amount of case law had developed on religious organizations and occupations, the implication being that Congress intended that this body of case law be employed in implementing the provision, with the addition of "a number of safeguards . . . to prevent abuse." See H.R. Rep. No. 101-723, at 75 (1990).

The statute states at section 101(a)(27)(C)(iii) that the religious worker must have been carrying on the religious vocation, professional work, or other work continuously for the immediately preceding two years. Under former Schedule A (prior to the Immigration Act of 1990), a person seeking entry to perform duties for a religious organization was required to be engaged "principally" in such duties. "Principally" was defined as more than 50 percent of the person's working time. Under prior law a minister of religion was required to demonstrate that he/she had been "continuously" carrying on the vocation of minister for the two years immediately preceding the time of application. The term "continuously" was interpreted to mean that one did not take up any other occupation or vocation. *Matter of B*, 3 I&N Dec. 162 (CO 1948).

Later decisions on religious workers conclude that, if the worker is to receive no salary for church work, the assumption is that he/she would be required to earn a living by obtaining other employment. *Matter of Bisulca*, 10 I&N Dec. 712 (Reg. Comm. 1963) and *Matter of Sinha*, 10 I&N Dec. 758 (Reg. Comm. 1963).

The term "continuously" also is discussed in a 1980 decision where the Board of Immigration Appeals determined that a minister of religion was not continuously carrying on the vocation of minister when he was a full-time student who was devoting only nine hours a week to religious duties. *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980).

In line with these past decisions and the intent of Congress, it is clear, therefore that to be continuously carrying on the religious work means to do so on a full-time basis. That the qualifying work should be paid employment, not volunteering, is inherent in those past decisions which hold that, if the religious worker is not paid, the assumption is that he/she is engaged in other, secular employment. The idea that a religious undertaking would be unsalaried is applicable only to those in a religious vocation who in accordance with their vocation live in a clearly unsalaried environment, the primary examples in the regulations being nuns, monks, and religious brothers and sisters. Clearly, therefore, the qualifying two years of religious work must be full-time and salaried. To hold otherwise would be contrary to the intent of Congress.

In a letter submitted with the initial petition [REDACTED] pastor of the petitioning church, states "our congregation numbers close to 100 members. We have one regular weekly

Service on Sunday, and frequent holiday, baptismal, confirmation and funeral services during the week,” during which the beneficiary plays the organ. The beneficiary “is also expected to practice organ playing for a couple of hours a day and to select new hymns for services.” In a subsequent, jointly-signed letter, [REDACTED] president of the petitioner’s church council, and Bishop Juan Cobrda of the Slovak-Zion Synod of the Evangelical Lutheran Church of America, state that the beneficiary “is working for the church for an average of 30 hrs a week.” There is no indication that the beneficiary’s hours would increase upon approval of the petition. It is not readily apparent that a church with less than one hundred members could hold enough “holiday, baptismal, confirmation and funeral services” to require or justify the beneficiary’s regular employment on a full-time basis. A 1998 report in the record indicates that even the church’s pastor works, on average, only 25 hours per week.

On appeal, counsel asserts that the finding that the beneficiary has not worked full-time for the petitioner “is factually . . . erroneous.” Counsel then repeats the claim that the beneficiary “works for the church an average of 30 hours a week,” which is less than the minimum 35 hours per week that CIS regards as necessary for employment to be considered full-time. Counsel fails to explain how it “is factually . . . erroneous” to conclude that an employee who works only 30 hours per week is not employed full-time.

The director’s principal finding was that the beneficiary’s work does not constitute a religious occupation. 8 C.F.R. § 204.5(m)(4) states that each petition for a religious worker must be accompanied by a job offer from an authorized official of the religious organization at which the alien will be employed in the United States.

The regulations at 8 C.F.R. § 204.5(m)(2) contains the following pertinent definition:

Religious occupation means an activity which relates to a traditional religious function. Examples of individuals in religious occupations include, but are not limited to, liturgical workers, religious instructors, religious counselors, cantors, catechists, workers in religious hospitals or religious health care facilities, missionaries, religious translators, or religious broadcasters. This group does not include janitors, maintenance workers, clerks, fund raisers, or persons solely involved in the solicitation of donations.

To establish eligibility for special immigrant classification, the petitioner must establish that the specific position that it is offering qualifies as a religious occupation as defined in these proceedings. The statute is silent on what constitutes a “religious occupation” and the regulation states only that it is an activity relating to a traditional religious function. The regulation does not define the term “traditional religious function” and instead provides a brief list of examples. The list reveals that not all employees of a religious organization are considered to be engaged in a religious occupation for the purpose of special immigrant classification. The regulation states that positions such as cantor, missionary, or religious instructor are examples of qualifying religious occupations. Persons in such positions must complete prescribed courses of training established by the governing body of the denomination and their services are directly related to the creed and practice of the religion. The regulation reflects that

nonqualifying positions are those whose duties are primarily administrative or secular in nature. Persons in such positions must be qualified in their occupation, but they require no specific religious training or theological education.

CIS therefore interprets the term “traditional religious function” to require a demonstration that the duties of the position are directly related to the religious creed of the denomination, that specific prescribed religious training or theological education is required, that the position is defined and recognized by the governing body of the denomination, and that the position is traditionally a permanent, full-time, salaried occupation within the denomination.

Further, while the determination of an individual’s status or duties within a religious organization is not under CIS’s purview, the determination as to the individual’s qualifications to receive benefits under the immigration laws of the United States rests with CIS. Authority over the latter determination lies not with any ecclesiastical body but with the secular authorities of the United States. *Matter of Hall*, 18 I&N, Dec. 203 (BIA 1982); *Matter of Rhee*, 16 I&N Dec. 607 (BIA 1978).

The initial filing documented the beneficiary’s piano training but not any specific religious training that would differentiate the beneficiary, as a church organist, from a wholly secular musician specializing in keyboard instruments. In response to a request for additional evidence in this regard, counsel asserts “in a Lutheran worship and creed [sic] . . . organic hymns and music are of the highest importance to the proper liturgy. In that sense, an organist performs the exact same role as a cantor would.” Counsel does not explain how the duties of an organist are exactly the same as those of a cantor, if the similarity exists only “in a sense.” It remains that the record contains no evidentiary support for counsel’s claim.

The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The director denied the petition, determining that the petitioner has not shown that the beneficiary’s position is a qualifying religious occupation. On appeal, counsel quotes the director’s decision: “the ESC director’s own determination states that beneficiary’s ‘duties did appear to require advanced religious training above the level of a caring and dedicated congregation member.’” Counsel then complains that “the remainder of the decision is contradictory” to this observation. The quotation cited by counsel derives from a paragraph that reads, in full:

You have petitioned for an Organist. The evidence in the record indicated that the beneficiary’s training was in Music and the duties did appear to require advanced religious training above the level of a caring and dedicated congregation member. You were requested, on September 26, 2001, to submit evidence to clarify these issues. You responded with a statement indicating that you felt that she qualified for the position and the position did qualify as a religious occupation. Which you feel is equivalent to a Cantor. You also indicated that the AAO has, in one decision, indicated that music is an integral part of the worship service. The Service is not bound by all decisions of the AAO, only the precedent decisions. The duties, rather than the

title determine eligibility and the duties delineated have not been established, with official church documents, to require advanced religious training and the beneficiary has not been shown to have such religious training. In the absence of evidence to establish such training and has been reviewed by the beneficiary [sic], the Service must conclude she nor the duties qualify [sic], for immigration purposes.

From the context of the paragraph as a whole, it is clear that the director did not find that the position requires advanced religious training, or that the beneficiary possesses such training. The director's apparent assertion that "the duties did appear to require advanced religious training" can be attributed to a simple typographical error, the omission of the word "not" between "did" and "appear." By inserting that word, the purported contradiction disappears. Furthermore, the paragraph in question demonstrably contains other omitted words, as shown by the ungrammatical composition of the final sentence. Therefore, it is not baseless speculation to assert that words were inadvertently omitted from the paragraph.

It remains that the petitioner has never claimed or demonstrated that the beneficiary does, in fact, possess specialized religious training. The petitioner has submitted ample documentation of the beneficiary's piano lessons (which began when the beneficiary was seven years old), but there is nothing inherently religious about learning to play keyboard instruments. The documentation of the beneficiary's training at Malinec Cultural Club from 1974 to 1982 says nothing about religious training. The petitioner has repeatedly resubmitted this documentation, but the petitioner has not established that the position of organist requires, or that the beneficiary herself possesses, any job-related training beyond the ability to play the organ. The petitioner has not shown that the denomination traditionally considers the position of organist to be a full-time paid position, rather than a part-time endeavor performed by volunteers or for nominal pay. While many different religions use music as part of their religious observances, it does not follow that everyone who sings or plays music during a service or celebration is engaged in a religious occupation. Indeed, in many Christian denominations, the entire congregation joins in the singing of hymns; it does not follow that every member of the church engages in a religious occupation.

The director plainly set forth the finding that "[t]he record does not establish that the beneficiary has been and will be employed in a religious occupation." Counsel's reference on appeal to what is clearly a typographical error when viewed in context does not rebut or overcome this finding.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.